IN THE

Supreme Court of the United States

OCTOBER TERM 1955

Office Supreme Court, U. S.
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No. 6.

SECRETARY OF AGRICULTURE OF THE UNITED STATES, *Appellant*,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 7.

UTAH POULTRY & FARMERS COOPERATIVE, ARMOUR AND COMPANY, AND SWIFT & COMPANY, *Appellants*,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 11.

SECRETARY OF AGRICULTURE OF THE UNITED STATES, *Appellant*,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 12.

UTAH POULTRY & FARMERS COOPERATIVE, ARMOUR AND COMPANY, AND SWIFT & COMPANY, *Appellants*,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH.

BRIEF FOR UTAH POULTRY & FARMERS COOPERATIVE, ARMOUR AND COMPANY, AND SWIFT & COMPANY, APPELLANTS.

JOHN H. PRATT,
905 American Security Building,
Washington 5, D. C.,
Counsel for Utah Poultry & Farmers Cooperative,
MARCUS WHITING,
4301 S. Racine Avenue,
Chicago 9, Illinois,
Counsel for Armour and Company,
ARTHUR C. O'MEARA,
JOHN P. STALEY,
4115 S. Packers Avenue,
Chicago 9, Illinois,
Counsel for Swift & Company.

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OPINIONS BELOW.

The majority and dissenting opinion of the District Court (R. 105 and 136) appear at 119 F. Supp. 846 and 864, respectively. The report of the Interstate Commerce Commission (R. 11) appears at 284 I. C. C. 377.

JURISDICTION.

On February 4, 1952, the Interstate Commerce Commission issued its report and order approving a tariff rule providing that the railroads would not allow a claim for loss or damage to a shipment of eggs unless and except to the extent the damage exceeds certain percentages of the eggs in each package containing damaged eggs. On January 20, 1953, the appellant, Utah Poultry & Farmers Cooperative, filed an action in the lower court to enjoin and set aside the Commission's order (R. 1, *et seq.*). The appellants, Armour and Company and Swift & Company, intervened in the lower court as a matter of right under 28 U. S. C. 1952 ed. §2323 and Rule 24(a) of the Federal Rules of Civil Procedure. The case was heard by a 3-judge district court pursuant to 28 U. S. C. A. 1952 edition §2325. On March 10, 1954, the lower court filed its opinion (R. 105), at the conclusion of which it said:

> "Judgment will be entered for the defendants, who are directed to prepare findings and conclusions and judgment pursuant to the foregoing opinion." (R. 135-136.)

Because of such decisions as *In Re Forstner Chain*

Corporation, 177 Fed. 2d 572, 576, 578, holding in somewhat comparable situations that the opinions constituted judgments, the appellants on May 7, 1954, filed their petition and other formal documents for appeal from the lower court's action of March 10 (R. 193 *et seq.*), and such appeal was designated as No. 172 (No. 7 in 1955 term). On May 7 the district court filed a formal document entitled "Final Decree" (R. 149), from which appellants filed their appeal on June 30, 1954. The appeal is No. 283 (No. 12 in 1955 term).* The jurisdiction of this court rests on 28 U. S. C. A. §§1253 and 2101(b). Probable jurisdiction was noted on October 14, 1954 (R. 1288).

STATUTES INVOLVED.

The statute involved is part I of the Interstate Commerce Act as amended (49 U. S. C. 1952 ed. §1 *et seq.*). Section 20 (11) of that Act [49 U. S. C. 1952 ed. §20 (11)] is set out in Appendix A, *infra*, p. 63.

Set forth in Appendix B, *infra*, p. 67, are the Carmack Amendment to the Interstate Commerce Act (Act of June 29, 1906, c. 3591, 34 Stat. 595), the Cummins Amendment (Act of March 4, 1915, c. 176, 38 Stat. 1197), and the first amendment to the Cummins Amendment (Act of August 9, 1916 c. 301, 39 Stat. 442).

* If the opinion of March 10 was the appealable order under 28 U. S. C. §1253, the May 7 appeal was obviously effective. If the decree of May 7 was the appealable order, then the June 30 appeal was effective. No legal principle is known under which the premature granting of an appeal from an unappealable order would deprive a court of its power to grant a valid appeal from a subsequent appealable order. In a somewhat similar situation in *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 178, this court said:

> "Under these circumstances an appellant may rely upon the latter appeal * * * and not run the risk of losing an appellate review on the appeal first allowed."

QUESTIONS PRESENTED.

The principal questions presented for review by appellant's Assignments of Errors may be formulated as follows:

1. Whether certain tariff regulations approved by the Commission and published by the railroads constitute a limitation of the railroad's liability or a limitation of the amount of recovery under §20 (11) of Part I of the Interstate Commerce Act and accordingly are unlawful and void. The regulations involved provide that no claim against a railroad for damage to egg shipments shall be allowed where the physical damage to the eggs at destination does not exceed certain percentages; and that where the damage exceeds those percentages, claims shall be allowed only in excess thereof.

2. Whether §20 (11) imposes a more limited liability upon the carrier than the common law liability rules and requires proof of negligence to establish liability.

3. Whether the susceptibility of eggs to breakage is an inherent vice which relieves the carriers from their normal common law liability.

4. If the Commission can properly approve regulations of the kind here involved, there is further presented for review the question whether the Commission's order is supported by adequate findings and substantial evidence on the records as a whole.

STATEMENT.

The immediate cause of the present controversy is that the Interstate Commerce Commission approved and the railroads, pursuant to such approval, published the following tariff provisions governing claims against the carriers for damage to shipments of eggs in transit (R. 53):

"*Section 6.*—On eggs placed in packages at rail point of origin of shipment, no claim shall be allowed where the physical damage to the eggs at destination does not exceed 3% of the contents of the packages containing damaged eggs. Where damage exceeds 3%, claims shall be allowed for all damage in excess of 3%, if investigation develops carrier liability.

Exception.—Where bona fide certificates of Federal or State egg inspection agencies showing extent of physical damage to eggs determined at rail point of origin of the shipment immediately prior to tender for rail transportation indicate the actual shell damage to be other than 2%, the percentage of actual damage as shown on such certificates, plus 1%, shall be used in lieu of 3% specified in this Section.

"*Section 7.*—On eggs placed in packages at points other than the rail point of origin, no claim shall be allowed where the physical damage to the eggs at destination does not exceed 5% of the contents of the packages containing damaged eggs. Where damage exceeds 5% claims shall be allowed in excess of 5%, if investigation develops carrier liability.

Exception.—Where bona fide certificates of Federal or State egg inspection agencies showing extent of physical damage to eggs determined at rail point of origin of the shipment immediately prior to tender for rail transportation indicate the actual shell damage to be other than 4%, the percentage of actual damage as shown on such certificates, plus 1%, shall be used in lieu of 5% specified in this Section."

Events Leading Up to the Administrative Proceedings.

The present controversy commenced shortly before July 24, 1948, when the railroads filed tariff schedules, to become effective on that date, making certain changes in the prior tariff regulations pertaining to egg shipments. Up to that time there were no tariff limitations as to the liability of a railroad for damage to shell eggs, other than "current receipts".* With respect to "current receipts", the Commission in 1919 had approved a tariff rule which limited the carriers' liability for damage to shipments of "current receipts" to damage in excess of five per cent of the total number of eggs. *National Poultry, Butter & Egg Association, et al.* v. *New York Central Railroad Co., et al.*, 52 I. C. C. 47. The basis for the Commission's order in 1919 was the "assumption that the shippers ordinarily pack into cases of 30 dozen eggs (of current receipts) approximately 18 broken or damaged eggs" (*Id.* at p. 49). But inasmuch as the evidence introduced in that proceeding showed that there was no such practice with respect to eggs other than "current receipts", the Commission held that it "is unreasonable to continue to apply such a rule to shipments of storage-packed eggs or to shipments of current receipts when thoroughly rehandled and repacked in new cases with new standard fillers" (*Id.* at pp. 49-50). It was determined in that proceeding that a "like restriction in respect of claims for damages to shipments of eggs would be unreasonable and unlawful except when applied to current receipts or current receipts rehandled" (R. 15; 284 I. C. C. 380).

* The term "current receipts" is used to describe run-of-the-nest eggs as received at the farms, ranches, and packing plants, before candling, grading, segregation of damaged eggs, and repacking. Such eggs contain every variety of size, color, and grade, as well as a proportion of checked, broken, cracked, leakers, stained, and dirty eggs. 284 I. C. C. 383.

The Administrative Proceedings.

The tariff schedules which the railroads filed to become effective July 24, 1948 extended the 5 percent rule to shipments of all eggs except those which had been rehandled and repacked at rail origin points (R. 15 and 16; 284 I. C. C. 380 and 381). The class of eggs principally affected by the change were those rehandled and repacked at points not located on a railroad and trucked thence to a rail origin. Those schedules were protested by certain parties. The Commission permitted them to become effective without suspension (R. 15; 284 I. C. C. 380), but on July 23, 1948, one day prior to their effective date instituted a general investigation (its Docket No. 30030) "into and concerning the reasonableness and otherwise lawfulness of the special regulations governing descriptions, marks, inspection and delivery, and the handling of claims thereunder in connection with the transportation, in interstate or foreign commerce, of shell eggs from, to, and between points in the United States, with a view to making findings and prescribing reasonable rules, regulations, and practices relative to such transportation" (R. 12 and 1284; 284 I. C. C. 378).

During the course of the hearing on those regulations, the carriers filed new schedules containing proposed regulations which would have increased the damage tolerance on eggs not placed in packages at the rail point of origin from 5 to 6 percent, and, in addition, the new regulations contained a damage tolerance of 4 percent for eggs placed in packages at the rail point of origin. The operation of those schedules was suspended in I. & S. Docket No. 5792, which was consolidated with Docket 30030 for hearing and disposition (R. 12 and 17; 284 I. C. C. 378, 381). Following hearings in the combined proceedings, the Commission in the order now subject to review approved such pro-

posed regulations but limited its approval to damage tolerances in the amounts of 5 percent and 3 percent in lieu of the tolerances of 6 percent and 4 percent proposed by the carriers (R. 43; 284 I. C. C. 403).

The appellants herein and numerous other parties entered appearances and participated in the administrative proceedings above described.

Facts Concerning the Egg Industry.

To understand the operation of the tariff regulations involved, it is helpful to have some knowledge of the way in which eggs are assembled, graded, packed, delivered and sold.

The eggs originate as current receipts.* The eggs shipped by the packing companies have been rehandled and repacked either at the origin of the rail shipment or at a point beyond whence they are trucked to the point of rail shipment. New wood and fiber cases, fillers and flats are used (R. 35 and 36; 284 I. C. C. 397). Into each case, 30 dozen eggs are packed, separated from each other by the flats and fillers.** Eggs are always packed vertically with the large end up (R. 20; 284 I. C. C. 384). After the eggs are packed, the cases are closed and loaded into the cars or trucks for transportation.

By rail the eggs are shipped in standard refrigerator

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* The record contains no evidence that current receipts move by rail. One of the principal railroad witnesses testified: "Actually, I think there are no true current receipts shipped" (R. 251).

** A flat is placed in the bottom of an egg case, and a filler is placed over the flat. The flat contains depressions in which the small end of the egg rests. The fillers are crossed sections of fiberboard interlocked in such a way that 36 spaces are formed for the insertion of eggs. When the first filler is packed, another flat and filler are placed over the first layer. (R. 28; 284 I. C. C. 391.)

cars (R. 299). A normal carload contains approximately 450 or 480 cases (R. 273, 421). The types of cases, flats and fillers and the manner of loading are governed by tariff provisions (R. 292, 725, and 886). Those regulations require the shippers to note certain information on the bill of lading (R. 43-52; 284 I. C. C. 403-407).

Grading and Packing Operations.

In the process of packing, all visible checked,* cracked, leaky,** stained,*** and dirty eggs,† and those containing blood spots or other interior defects are removed (R. 21; 284 I. C. C. 385). The usual commercially accepted method of examining eggs is by candling. This process consists of placing the eggs before a candle lamp so that the contents may be seen and the eggs classified in accordance with certain fixed standards. There is keen competition between egg producers and shippers throughout the entire country. Hence, all egg producing plants are operated in substantially the same manner and according to the same competitive standards (R. 30; 284 I. C. C. 393).

In candling, grading, and packing the eggs, absolute perfection is commercially impossible because of human error, and the commercially sound shipment does contain some checked and some inedible eggs‡ (R. 30; 284 I. C. C. 393).

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* "Checked" applies to eggs with small cracks in the shells but in which the shell membrane is not broken (R. 20; 284 I. C. C. 384).

** "Leakers" are eggs on which the shells and membranes are broken to the extent that the contents thereof exude (R. 21; 284 I. C. C. 385).

*** "Stained" eggs are those on which the shell is stained or soiled from contact with broken or leaking eggs (*id.*).

† "Dirty" eggs are those with adhering dirt or with more than one-eighth of the shell surface stained or soiled (*id.*).

‡ Origin tests by the U. S. Department of Agriculture showed 1.9 percent checks and only 0.1 percent loss (R. 31, 284 I. C. C.

U. S. Department of Agriculture Inspections and Grades.

Approximately 10 percent of the eggs produced throughout the entire country is inspected and graded under supervision of the U. S. Department of Agriculture. In this operation an adequate and representative sample of the shipment is inspected, and each egg selected is usually inspected, candled, and graded (R. 31; 284 I. C. C. 393).

The eggs are also clicked together to detect checks (R. 350).

The Department of Agriculture has promulgated official U. S. specifications and weight classes for wholesale and consumer grades of shell eggs (Ex. 20 and 21; R. 330, 1123-1126). These specifications permit certain percentages of stained, dirty, or checked eggs and loss (R. 1124). For example, in order to be classed as "U.S. Specials", a lot of eggs must include at least 20 percent of AA quality and the balance of A quality; but may contain 7.5 percent in any combination of B quality, C quality, stained, dirties, or checks, and 1.7 percent loss (*id.*). "Loss" includes blood spots, meat spots, rots, and leakers (R. 330 and 476). In consumer grades AA and A, 5 percent of shell damage, consisting of 0.5 percent leakers, and 4.5 percent checks or stains, is permitted (R. 41; 284 I. C. C. 401). The tolerances are set up primarily for the purposes of making allowance for human error (R. 342).

Some New York market prices on shell eggs are shown in Exhibit No. 14 offered by railroads (R. 226, 1091). It will be noticed that some of the quotations are for "specials", "extras", "standards", and "Cons. Grade A", all of which are designations used in the U.S.D.A. grade specifications (Ex. 20 and 21; R. 330, 1121, 1125).

393-394). The 1.9 percent checks were, however, found by candling and clicking, and could not be detected by the kind of inspection performed at New York (*id.*).

The eggs are packed for shipment in wood or fiber cases, each of which contains 30 dozen eggs separated from each other by flats and fillers.

Eggs Can Be Transported Safely.

That eggs can be safely transported in such a manner that the shipper or consignee will not be damaged is shown by the following.

Eggs are safely transported in trucks. The record indicates that in the transportation of eggs by motor truck the amount of shell damage is negligible (R. 39; 284 I. C. C. 400).

Eggs were safely transported by rail in 1941. In its report, the Commission found that claims for damage to eggs throughout the entire country during that year totalled only $110,000* (R. 38; 284 I. C. C. 399), and that prior to World War II under loading and packing practices similar to those during later years, damage to shipments of eggs was reasonably low (R. 29; 284 I. C. C. 392).

Eggs are safely transported by rail to all parts of the country except Trunk-line and New England territories,** such as the South, the Southwest, and Pacific Coast. The Commission found that the egg claims which have reached substantial amounts during the past decade and longer accrue principally through shipments to Trunk-line and New England territories and that "generally there has been no increase in the damage on shell eggs moved by rail to other territories such as the South, the Southwest, and the Pacific Coast" (R. 22; 284 I. C. C. 385-6).

Eggs are transported to points in Official Territory,

* By 1947 the claims had increased to $2,338,462 (*id.*).

** Roughly speaking, these territories are that part of the country which lie east of the Buffalo-Pittsburgh line and north of the Ohio and Potomac Rivers (R. 963).

such as Biddeford, Maine, Elizabeth, N. J., Erie and Greensburg, Pa., Newark, N. J., Utica, N. Y., Worcester, Mass., and other points, with expectation of few though large damage claims (R. 38-39; 284 I. C. C. 399).

Even in 1947, 5 out of each 6 cars were safely transported to Baltimore, Md.; 3 out of each 4 were safely transposted to Boston; 1 out of each 2 was safely transported to Philadelphia; and 1 out of each 3 was safely transported to New York City.*

Initial Inspection for Rail Damage at Destination.

At all times involved there have been tariff rules governing inspection of egg shipments at destination.

Up to May 2, 1952, the rules permitted the consignee or his representative to lift the lids on 20 cases in any carload and examine the top layer thereof to ascertain whether such cases contained damaged eggs. If such examination showed no evidence of damage, it was considered final for the entire shipment and a good order receipt was required of the consignee. If such examination disclosed damage, consignee had the right "to make further examination of the shipment and to set aside all cases containing damaged eggs. Joint inspection of all such cases set aside shall be conducted by representative of carrier and consignee or his representative, and extent of damage, together with facts pertaining thereto, shall be noted on paid freight receipt or other document and signed by joint inspectors" (R. 44 and 46; 284 I. C. C. 403 to 405).

Under the regulations which became effective on May 2, 1952, pursuant to the Commission approval from which this appeal is taken, the consignee or his representative has the privilege of opening each package at no expense to the

* Based upon comparisons of figures in table at R. 23; 284 I. C. C. 387.

carrier and of initially examining the contents thereof; provided, however, on notice by the carrier, such initial examination shall be in the presence of the carrier's representative. If any package contains eggs having shell damage for which the carriers may be deemed responsible, the contents of such package shall be jointly inspected by the consignee and the carrier, or their representatives, "and such joint records shall be conclusive as to the nature and extent of damage" (R. 52 and 53).

Reconditioning Damaged Cases of Eggs.

Where eggs are damaged by a railroad, the grade of the eggs is necessarily destroyed* (R. 1001). In practice the damaged cases are repacked or reconditioned. The Commission found that this process is as follows:

> "In the repacking or reconditioning process, eggs are transferred from a damaged case to a good case one whole layer (3 dozen) at a time. In replacing the smashed and leaking eggs, inspection to the next lower layer in the case is continued until a good layer is found. If, however, there is only one leaker in the top layer that egg is replaced and the case is put in the good-order pile. In the inspection the lid must be removed completely from the case, no candling lamp is used and the eggs are not clicked. The inspection is merely visual"** (R. 33; 284 I. C. C. 395).

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* It is obvious that a case of eggs known to have been damaged is like a "pig in a poke" until the eggs have been removed from the case and the extent of the breakage determined.

** At another point in its report the Commission found: "In the inspection at destination the consignee's representative examines every egg in the cases disclosing damage." (R. 21; 284 I. C. C. 385.) The two findings directly conflict. The finding at R. 33 is based upon the testimony of a man with 40 years' experience in the egg business, who for the past 10 years has been making destination inspections and reconditioning egg shipments at New York (R. 467, *et seq.*). His testimony was supported by other shipper witnesses (R. 607, 608, and 615). The conflicting finding at R. 21 was based upon a statement by a special agent of the Com-

Joint Record of Damaged Condition.

The regulations in effect up to May 2, 1952, provided that the extent of damage together with facts pertaining thereto should be noted on paid freight receipts and other documents and signed jointly by inspectors of the carrier and consignee (R. 44, 47, and 48; 284 I. C. C. 403-4-5-6). The regulations which became effective on May 2, 1952, provided that any damage should be jointly inspected and the joint record would be conclusive as to the nature and extent of the damage (R. 50).

Method of Calculating Damage Sustained by Shipper or Consignee. Consignee Suffers Some Slight Loss on Each Damaged Shipment.

All of the prior regulations and also those approved by the Commission contain provisions under which, in case of carrier's liability, actual and necessary charges incurred for labor and material in reconditioning the damaged cases and contents showing damage shall be borne by the carrier (except that under the May 2, 1952 regulation the carrier is obligated only for a percentage of such costs

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mission's Bureau of Inquiry, who, in a special investigation, witnessed the inspection and repacking of a number of damaged egg shipments at the Erie Railroad's pier in New York City (R. 177, 178, 182). The investigators' testimony is also contradicted by the manager of the Railroad Perishable Inspection Agency, who testified that the consignee "may go through the case all the way to the bottom or he may stop at the top. That is up to him, when he is talking about damage he wants us to recognize." (R. 300). The limited nature of the special agent's inspection of the reconditioning process is emphasized by the fact that on cross-examination he was unable to recall whether the consignees "clicked" the eggs, and said: "Well, it is a pretty fast operation and I wasn't a very skilled observer but they didn't seem to have any special equipment and they did it rather quickly" (R. 194). Certainly one man's unskilled observation of what happened to a few shipments at one pier in New York City cannot be the basis for a valid finding of fact as to the general practice in that city or generally throughout the country.

where the tolerance rules apply) (R. 45, 49 and 54, 284 I. C. C. 404, 407, and 408).

In an analysis of 150 claims, the railroads found that of the total amount claimed the portion allotted to damage to the eggs was 69 percent; to labor, 26 percent; to material, 4.5 percent; and to warehouse charges, 0.5 percent (R. 38; 284 I. C. C. 399).

As recovery for damage is usually less than the cost of examining and reconditioning the cases together with the value of the damaged contents, the consignee suffers some slight loss on each damaged shipment (R. 30; 284 I. C. C. 392). This finding was made by the Commission on the basis of shipments on which no tolerances were applied.

Condition of Commercial Egg Shipments at Rail Origins and Destinations.

The Commission found as follows. A careful inspection by the U. S. Department of Agriculture made of the eggs as they were loaded into 115 railroad cars in 1948 and 1949 at points in the midwestern area, disclosed that they contained on the average (R. 31; 284 I. C. C. 393 and 394):

Stains and Dirties	Checks	Loss
1.4%	1.9%	0.1%

The 1.9 percent checks were, however, found by candling and clicking, and could not be detected by the kind of inspection performed at New York. An examination of those identical shipments at destination showed the following (*id.*):

Stains and Dirties	Checks	Loss
2.1%	2.7%	0.3%

During transportation, the stains and dirties reflected increases of 0.7 percent, the checks 0.8 percent, and the loss

0.2 percent, respectively, incident to the movement in transit (*id*).

The 115 cars contained some damaged cases at destination which were recorded and averaged into the above figures (R. 474) but the Commission took no notice of that fact. Nevertheless, the Commission found that the above figures together with results of a similar origin inspection of 737 cars indicate "an average damage of 3.4 percent at origin and 5.1 percent at destination, and typifies the character of eggs which are loaded into railroad cars at points of origin" (*id.*). The 3.4 percent is the sum of the 1.4 percent (stains), 1.9 percent (checks), and 0.1 percent (loss) in the 115 car origin inspection. Similarly, the 5.1 percent is the sum of the 2.1 percent (stains), 2.7 percent (checks), and 0.3 percent (loss) in the 115 car destination inspection.

From the above figures, the Commission concluded that: "there is a normal expectancy of shell damage in every car loaded with eggs, and that it is at least impractical to load a perfect car"* (R. 32; 284 I. C. C. 394).

The results of the U. S. D. A. 115 car origin test are corroborated by the results of a special test of 60 cars made by the railroad in Iowa and Minnesota in 1949. In that inspection, the railroads examined 15 cases in each car and 100 eggs in each such case (total, 90,000 eggs) by candling and found 2,256 checks, 98 broken eggs, and 183 stains (R. 302, 303, 1283, and 1284), from which it is easily calculated that the average condition of the 60 shipments was as follows:

Stains and Dirties	Checks	Broken
0.2%	2.50%	0.11%

* Whether anyone ever shipped a perfect car of eggs and what useful purpose would be served thereby are questionable. Whether the shipper is damaged moneywise depends upon whether or not the eggs meet grade specifications and are accordingly salable at destination.

The 115 car origin results are also corroborated by a Department of Agriculture summary of grading reports for 2,212 cars of eggs loaded in midwestern states in 1942, 1943, and 1948 (Ex. 22, R. 362 and 1128) which show the following conditions:

Stains and Dirties	Checks	Loss
1.4%	1.4%	0.1%

The 115 car destination figures are corroborated by a Department of Agriculture summary of grading reports for 2,513 cars of eggs at destination showing the following condition (*id.*):

Stains and Dirties	Checks	Loss
.5%	1.5%	0.2%

One fact which stands out in the results of all of the above tests and inspections is that the percentage of "loss" eggs was extremely low. The sound commercial shipment contains an insignificant number of broken eggs at both origin and destination unless it is damaged in the course of transportation.

Condition of Damaged Cases at Eastern Destinations.

In a table in the Commission's report (R. 24; 284 I. C. C. 388) are set forth the number of damaged cases received in 1947 at New York, Philadelphia, Baltimore, and Boston together with an analysis of the character of the damage in dozens, and the percentages represented thereby. Bearing in mind that each case contains 30 dozen eggs, it can readily be calculated that the condition of the damaged cases at New York in 1947 was as follows:

Stains and Dirties	Cracked	Loss*
3.38%	2.28%	5.45%

* Broken eggs and leakers represent total loss (R. 25; 284 I. C. C. 388).

Average condition of damaged cases received at the 4 destinations in 1947 is as follows:

Stains and Dirties	Cracked	Loss
3.68%	3.68%	5.69%

Comparison of the percentages of loss in these damaged cases with the U. S. D. A. grade specifications (Ex. 20 and 21, R. 330, 1124, 1126) reveals such high loss that such damaged cases could not comply with any U. S. grade specifications either wholesale or consumer. Similarly that amount of loss contrasts strikingly with that found either at origin or at destination in any of the test analyses of record.

The position in which the damage is found in the cases is plain from the testimony of the R.P.I.A. manager (R. 879):

> "Our inspections at destination markets show that most of the damage found is to the side of the egg and to those eggs in the first row of cells of the filler against one end of the case and the corresponding side of the center board of the case."*

* Shipper witnesses testified that damage so located in the case evidences rail damage (R. 413, 940, and 942). The Commission found:

> "Protestants contend that damage to eggs in transit is usually distinguishable from that which existed prior to rail transportation by the extent and location of the damage; that eggs damaged at the time of loading are scattered throughout the case and are not massed at any one point; that damage occurring in transit, from impacts caused by rough handling, is most severe at the outside and inside rows of the fillers where the eggs adjoin the end or side of the case, or its center partition; and that such damage does not result from packing operations. These contentions are highly problematical and overlook the fact that mass damage may also occur during the moving of the cases from the packing plant to the railroad car, in the actual loading into the car, and as a result of the manner in which the cases are loaded and braced." (R. 30; 284 I. C. C. 392, 393.)

If such damage found at New York resulted from loading specifications similar damage would be found in cars shipped to points in the United States other than New York, Boston, Philadelphia, and Baltimore.

The record contains evidence of the general condition of damaged egg shipments at New York. Exhibit 45 (R. 814-815; R. 1190-1195) shows R.P.I.A. inspection reports on the condition of 31 cars from Utah, of which 27 were shipped to New York City or adjoining cities, and 4 to other points in 1950. Exhibit 47 (R. 818-819; R. 1197-1200) shows similar reports on 16 cars to New York City. The description of the general condition of the first shipment shown on Exhibit 45 is typical:

> "Straw buffing. 7th stack 'B' end shows upper cases overlapping lower cases up to 3 inches in direction of 'A' end. 'A' end 1st stack jammed against bunker wall. Ends of cases pushed in, bottoms wet due to leakage and matted to lower cases. 40 cases externally damaged in this one stack. 269 cases concealed damage. 308 cases contained 9,240 dozen."

The cars shown in these exhibits were shipped by Utah Poultry & Farmers Cooperative, which in 1949 shipped 104 carloads from Utah to eastern destinations, of which only 33 carloads were delivered without damage. In the first half of 1950 it shipped 52 carloads to eastern destinations, of which only 10 were delivered without damage. During the same period it shipped 136 cars to the Pacific Coast area and practically all were delivered in good order (R. 37-38; 284 I. C. C. 398-399).

The record contains no R.P.I.A. reports showing the general condition of individual egg shipments other than those in Exhibits.

Effect of Tolerance Provisions on Claims.

The record discloses that the tolerance rules here involved have the following effects on egg shipment claims:

1. The tolerance provisions purport to operate on the legal liability of the railroads to the interested consignee after the eggs have been deliver d at destination and prob-

ably after they have been eaten by the ultimate consumer. This is obvious from the wording of the rule, "no claims shall be allowed . . .".

2. The tolerance provisions do not give any noticeable effect to the usual legal principles governing the measure of damages, namely, that the railroad is liable for the difference between the value of the shipment at destination in the condition in which it would have arrived if properly handled, and its value in the damaged condition in which it actually arrived. Instead, they purport to impose a portion of the damage loss on the shipper because of the shell characteristics of a small fraction of the eggs shipped which do not detract from the destination value of the shipment if not damaged in transit.

3. They assume that the origin condition of each shipment of non-federally inspected eggs is the same. Actually, the origin condition of no two shipments is the same. See Exhibit 15 (R. 301-302; R. 1283-1284). Thus the regulations penalize the shipper of carefully selected and packed eggs and prefer careless shippers whose eggs contain a higher percentage of stains, checks and loss. Since, even without a tolerance, the consignee suffers some slight loss on each damaged shipment (R. 30; 284 I. C. C. 392), any tolerance would increase that loss and penalize the shipper whose eggs are damaged in transit and prefer the shipper whose eggs arrive at destination in good order.

4. The tolerance rules completely eliminate carrier liability up to the prescribed percentages; and the percentages are based upon stained and cracked eggs as well as "loss", even though stained eggs are salable, albeit at prices somewhat lower than those for sound eggs, whereas leaking and broken eggs represent total loss (R. 25; 284 I. C. C. 388). This results from lumping all such shell conditions under the characterization "physical damage to eggs" as used in the tariff rule (R. 1286B).

5. The principal if not the sole effect of the tolerances is to reduce the carriers' liability and increase the consignees' losses rather than to eliminate claims. This is apparent from pages 5 and 6 of Exhibit 48 (R. 857-858; R. 1206 and 1207) which show application of the 5 percent rule to the 12 damaged cars arriving in New York in January of 1950 to which the 5 percent rule applied; page 7 of Exhibit 49 (R. 858 and 859, R. 1219) showing application of the 5 percent rule to the 37 damaged cars which arrived in New York in August of 1948; and pages 4 to 6 of Exhibit 50 (R. 859-861; R. 1224-1226) which show application of the proposed 4 percent rule to all 106 damaged cars arriving at New York in January, 1949, to which the rule would have applied if effective. The claim on each such car was reduced by application of the tolerance rules, *but not one of the claims was eliminated by application of the 5 percent rule.*

6. Tolerance rules result in substantial reductions of claims. Exhibit 49 (R. 858-859; R. 1212) shows that claims on all 312 "5 percent claim cars at New York" from August, 1948, to June, 1950, were reduced *42.2 percent* by the 5 percent rule. Exhibit 50 (R. 859-861, R. 1221) shows that claims on all 1439 "4 percent claim cars" at New York from January, 1949, to June, 1950, would have been reduced *37.7 percent* by the proposed 4 percent rule. Exhibit 51 (R. 861-862; R. 1228) shows that all 171 "6 percent claim cars" at New York from January, 1949, to June, 1950, would have been reduced *50 percent* by the proposed 6 percent rule.

Basis of the Commission's Approval.

To the extent to which the basis of the Commission's holding is revealed in the report, it will probably be found somewhere in the following excerpts therefrom:

"The physical condition of the eggs at the time they are offered for transportation, rather than specific descriptions, should be the basis of the regulations governing claims incident to such transportation. The proposed regulations are designed to accomplish needed changes in the present regulations based upon evidence obtained during the course of the investigation in the title proceeding.

"Respondents are not attempting by the proposed regulations to limit carrier liability, in that they are directed against losses due to the inherent nature of shell eggs rather than against losses caused by the carriers. These regulations merely establish a means to determine the amount of damage existing at the time the shipment is received by the carrier and the amount of damage resulting solely during transportation because of the inherent nature of the shipment." (R. 18 and 19; 284 I. C. C. 383.)

* * * * *

"Checked eggs are weak in their structure and defective, * * *." (R. 20; 284 I. C. C. 384.)

* * * * *

"Eggs are highly perishable and fragile. A certain amount of damage occurs to them during the grading and packing operations. The principal cause to which shell damage prior to rail transportation is attributable is the fragility of the commodity." (R. 26; 284 I. C. C. 389.)

* * * * *

"The result of these (U. S. Department of Agriculture) inspections indicates an average damage of 3.4 percent at origin and 5.1 percent at destination, and typifies the character of eggs which are loaded into railroad cars at points of origin. It also establishes that there is a normal expectancy of shell damage in every car loaded with eggs, and that it is at least impractical to load a perfect car." (R. 31 and 32; 284 I. C. C. 394.)

* * * * *

"It (the record) does indicate, however, based on the

number and amount of claims, that the inspection of shipments of eggs arriving at New York is being performed with a view to detecting all damaged eggs. Claims in amounts exceeding 50 percent of the revenue on the entire egg traffic to New York in 1947 do not appear to be based on a cursory inspection." (R. 34; 284 I. C. C. 396.)

* * * * *

"The present and proposed regulations are not limitations of the carriers' liability in respect of damage to property transported by them. They constitute merely tariff rules and practices designed to relieve the carriers from paying claims for damages which are not attributable to their negligence but which result from the inherent nature of the commodity transported. Such inherent defects were recognized in No. 10012, wherein division 2 found a tolerance of 5 percent in respect of 'current receipts eggs' not unreasonable or otherwise unlawful. The record herein establishes that there are inherent defects also in eggs other than so-called current receipts." (R. 40; 284 I. C. C. 401.)

* * * * *

"Eggs containing checks, blind or visible, are to a certain extent in a damaged condition. In other words, the shells on those eggs are defective or cracked. These defects or cracks, unlike breaks or fractures in the bones of animate things, do not heal or knit with the passage of time. Any change in the condition of a defect or crack in an eggshell can result only in its enlargement, a healing or knitting thereof not being possible. The slightest movement in transportation may cause additional damage to such eggs. Such damage cannot be imputed to the negligence of the carrier but rather to the inherent nature of the commodity. Even a slight enlargement of the check or defective part could, by a rupture or break in the shell membrane, result in a leaking egg. Such an egg causes additional damage, such as stains, to otherwise sound eggs in the same case.

"On the record in these proceedings, the present

> tolerance of 5 percent in respect of all eggs, other than those described as rehandled and repacked, and storage packed eggs, processed at packing plants or storage warehouses at point of origin of the rail shipment, appears reasonable. The damage to such eggs for which respondents are not responsible averages that amount." (R. 42; 284 I. C. C. 402.)
>
> * * * * * *
>
> "As stated, the present 5-percent tolerance on eggs not processed at the rail point of origin appears reasonable. The record also supports a finding that a tolerance of 3 percent would be reasonable on eggs processed at the rail point of origin." (R. 43; 284 I. C. C. 402.)

The above language does not reveal clearly the course of reasoning which led to the Commission's decision and leaves room for considerable speculation.

The fact that the regulations which were approved provide for the addition of 1 percent to the "shell damage" revealed at origin by governmental certificates (where such certificates exist) (R. 1286B) indicates that of the 3 percent and 5 percent tolerances, respectively, the Commission may have attributed or allocated 1 percent to damage presumed to have occurred in transit and which the Commission believes is attributable solely to fragility of eggs generally (or perhaps of checks only) and which the Commission thinks is an inherent vice or defect for which the carriers would not be liable under established legal principles. The Commission did not so state, though it could easily have explained its reasoning and the facts upon which it relied.

If the Commission attributed 1 percent of the tolerances to damage in transit resulting from an inherent vice or defect, then the Commission must have attributed the remaining 2 percent and 4 percent, respectively, to checked eggs or "shell damage" which normally exists in the sound commercial shipment.

If the above assumptions are correct, it seems probable that the 2 percent figure was obtained from the 1.9 percent checks and 0.1 percent loss found at origin in the 115 car test inspection by the U. S. D. A. (R. 302, 303; R. 1183, 1184), and that the additional 1 percent attributed to damage in transit was based on the increase of 0.8 percent in checks and 0.2 percent in loss which, according to that test, occurred while the 115 cars were in transit (*id.*). The Commission does not so state.

If the above assumptions are correct, then with respect to the 1.9 percent checks at origin, the Commission must have assumed either (1) that the 1.9 percent checks arrive as checks at destination and that each such check is found in the destination inspection and segregated as a check, or (2) that the 1.9 percent checks all become leakers in transit due to their checked shells. But these assumptions are disproved by the record.

It cannot be assumed that origin checks which arrive at destination as checks are found and segregated in the destination inspection. The Commission found:

> "The 1.9 percent checks were, however, found by candling and clicking, and could not be detected by the kind of inspection performed at New York" (R. 31, 284 I. C. C. 393, 394).

Neither does the record justify an assumption that each of the 1.9 percent checks in a case became further cracked or broken in transit and was found and segregated in the destination inspection. This is clear from the following:

1. R. P. I. A. Manager Jensen testified that R. P. I. A. inspections at destination markets show that most of the damage found is to those eggs in the first row of cells of the filler against one end of the case and the center board thereof (R. 879). Obviously checks which found their way into the case through human error would not be concentrated at a particular place in the case.

2. The Commission found that in the reconditioning process eggs are transferred from a damaged case to a good case one whole layer (3 dozen) at a time, and that in replacing smashed and leaking eggs, inspection to the next lower layer in the case is continued until a good layer is found (R. 33; 284 I. C. C. 395). The 1.9 percent origin checks obviously would be distributed throughout the case; and those in the good layers not inspected could not possibly be seen.

3. The Commission carefully avoided a finding that the 1.9 percent origin checks all become broken or are discovered at destination. The Commission said merely that, "The slightest movement in transportation *may* cause additional damage to such eggs," and, "Even a slight enlargement of the check or defective part *could*, by a rupture or break in the shell membrane, result in a leaking egg" (R. 42; 284 I. C. C. 402). The Commission embroidered its report with adjectival characterizations of the supposed fragility of the checked egg. Whether checks become leakers in normal transportation is a simple question of fact easily determined; and generalizations of the type used by the Commission afford no proof. In the 115 car U. S. D. A. test described by the Commission, the fact that the increase of "loss" in transit was only 0.2 percent (R. 31; 284 I. C. C. 393, 394) should afford sufficient answer to the Commission's inference. There is other proof in the record. Cases containing 100 percent checked eggs are shipped by rail from Utah to Los Angeles; and at destination, only about 1 percent are leakers (R. 842, 843).

4. The Commission's inference that checks become leakers in transit constitutes a direct reversal of a simple finding of fact made in a previous case by the Commission. In *National Poultry, Butter & Egg Asso.* v. *N. Y. C. R. R. Co.*, 52 I. C. C. 47, 54, the Commission said:

"It should not be concluded, however, that if on an average 19 cracked eggs are packed in a case for shipment, these may reasonably be expected to develop into broken eggs by the necessary and ordinary shocks of transportation. The testimony in this case as to the experiments with cases containing cracked eggs which were subjected to shocks similar to those received in railroad transportation indicates that cracked eggs resist shocks almost as well as sound eggs. Entire cases of cracked eggs are shipped over the railways with little more damage than sound eggs."

Even if all of the above described assumptions were correct and if the Commission's course of reasoning were subject to some kind of rationalization and not confounded by other findings in the report, or by uncontradicted evidence, the fact would still remain that the ultimate basis for the Commission's action is its assumption that the lawful measure of damages rests upon shell conditions present in every sound commercial lot of eggs wherever shipped, received, bought or sold, which do not detract from the commercial value of the eggs nor result in damage moneywise to the interested shippers or consignees. Even if Section 20(11) of Part I of the Interstate Commerce Act were nonexistent and if the carriers could lawfully publish tariff rules affecting damage claims, the only proper basis for such regulations would not be a technical analysis of minute shell irregularities existing at origins of shipments; but rather, the only proper lawful basis would be the difference in the value of the eggs at destination in the condition in which they would arrive with normal, careful handling and their value in the damaged condition in which they actually arrive; and that the only useful purpose served by analyzing the shell characteristics of a lot of eggs either at origin or destination is to learn whether it meets grade specifications and therefore whether it will sell at the market price for that grade.

The Decision of the Lower Court.

Following the Interstate Commerce Commission's order approving damage tolerance rules for shell eggs (R. 11; 284 I. C. C. 377), an action was commenced in the United States District Court for the District of Utah, Central Division, by Utah Poultry & Farmers Cooperative against the United States of America and the Interstate Commerce Commission for an order asking that the Commission's order be enjoined and set aside and seeking certain other relief. (R. 1). Armour and Company, Swift & Company and the Secretary of Agriculture of the United States intervened as plaintiffs (R. 55, 56, 60, 80, 81 and 82), and one hundred and thirty-one railroads intervened as defendants (R. 91-96). In their answers, the Interstate Commerce Commission and the intervening railroads sought dismissal of the complaint (R. 88, 102), but the United States admitted the allegations of the complaint and asked that the Commission's order be set aside (R. 84).

In its majority opinion, the lower court found for the defendants and dismissed the complaints. The general reasoning of that court was that the restraint imposed upon the carriers and the Commission by Section 20 (11) of the Act is not broad but is in terms narrowly limited by reason of the words "caused by it" as used in the language "full actual loss, damage or injury to such property caused by it" (119 F. Sup. 846, 858); that the Commission heard evidence and found that the regulations "are directed against losses due to the inherent nature of shell eggs rather than against losses caused by the carrier (*id.*, p. 59) * * *" that such finding was one of the kind entrusted by Congress to the Commission (*id.*, p. 858); and that the Commission's findings that the regulations as to tolerance regulations are not limitations of carrier liability but are tariff rules designed to relieve carriers from

all damage claims which are not attributable to their negligence or other fault, involves a question of fact which legally can be decided only by the Commission, and when so decided with substantial support of evidence, will not be disturbed by the courts (*id.*, p. 860).

In the course of its decision the lower court cited and relied upon several Supreme Court decisions recognizing the Commission's expertise in rate making and certain other functions and narrowly defining the scope of judicial review where such functions are performed by the Commission (*id.*, pp. 860-863).

In his dissenting decision, Judge Knous held in effect that fragility of eggs is not an inherent vice and that the tolerance rules limit the liability of the carrier and violate the prohibition of Section 20(11) of the Act (*id.*, p. 867).

SUMMARY OF ARGUMENT.

I.

A. The doctrine of administrative finality does not apply in this case. Each claim for loss or damage to a shipment is essentially a private matter involving the railroad's liability for damage to a single shipment. Loss and damage claims are not within the jurisdiction of the Commission. *Bills of Lading*, 52 I. C. C. 671, 685, and other Commission decisions. The Commission has no power to change the measure of damages by prescribing rules which would have that effect. *Rosser & Fitch* v. *A. C. L. R. R. Co.*, 91 I. C. C. 611, and *Perishable Freight Investigation*, 56 I. C. C. 449.

B. "Liability," the limitation of which is prescribed by section 20(11) of the Interstate Commerce Act, is the well defined liability imposed on carriers by common law. Decisions of this court so hold. *Atlantic C.L.R. Co.* v. *Riverside Mills*, 219 U. S. 186, and other decisions. The legislative history of section 20(11) leaves no doubt that the liability therein imposed is the ordinary common law liability of a common carrier.

C. Under the common law rule a carrier is liable for failure to transport safely goods entrusted to its care unless the loss or damage was due to stated exceptions. *Chesapeake & O. R. Co.* v. *Thompson Mfg. Co.*, 270 U. S. 416, 421-2, and other decisions.

D. Where a shipment is damaged in transportation, the common law measure of damages is the difference between the market value of the property at destination had it been received in good condition and its market value there in the condition in which it did arrive. *Gulf C. & S.*

F. R. Co. v. Texas Packing Co., 244 U. S. 31, 37, and other decisions. The cost of labor and material in reconditioning the damaged cases is also a proper item of damages.

E. The tolerance rules produce different results than the established common law rules governing the lawful measure of damages and constitute a limitation of liability under section 20(11) of the Act.

(1) The facts with respect to individual egg claims differ widely. The tolerance rules assume they are identical; and accordingly, on each individual claim, the tolerance rules produce different results than the lawful measures of damages applicable to the particular shipment. The results produced by the tolerance rules are haphazard and illogical.

(2) The only lawful measure of damages is based upon market value at destination. The tolerance rules are based upon "the physical condition of the eggs at the time they are offered for transportation."

(3) The susceptibility of eggs to damage in the course of transportation is not an "inherent vice." Eggs do not break themselves, but can be broken only by application of external force. This type of breakage is not an inherent vice or defect of the kind within the exception to common carrier liability. That exception applies only to such natural or inherent causes as fermentation, depreciation, drying, decaying, spontaneous combustion, or the operation of other natural processes within the egg which cannot be attributed to the carrier in any way. If susceptibility of eggs to damage is an inherent defect, it is of recent origin and exists only in connection with rail shipments to a limited number of eastern destinations.

II.

The Commission's order and report are based on conflicting findings and are not supported by adequate findings or substantial evidence on the record as whole. The Commission's findings cannot stand unless they are supported by substantial findings on the record as a whole. *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474, and other cases.

A. Evidence on the record as a whole does not support the approval of different tolerances for eggs packed at rail origins than for those packed at places other than rail origins.

B. The Commission's finding that the record indicates that "the inspection of shipments of eggs arriving in New York is being performed with a view to detecting all damaged eggs" is uncertain in meaning and is contradicted by other findings.

C. The Commission's inference that checked eggs become broken in transit is couched in vague language and is contrary to the evidence.

ARGUMENT.

I.

THE TARIFF REGULATIONS INVOLVED IN THIS APPEAL ARE UNLAWFUL AND VOID UNDER SECTION 20 (11) OF PART I OF THE INTERSTATE COMMERCE ACT.

Section 20 (11) of Part I of the Interstate Commerce Act [49 U. S. C. 1952 ed. §20 (11)] provides:

> "That any * * * railroad * * * receiving property for transportation * * * shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any * * * railroad * * * to which such property may be delivered or over whose line or lines such property may pass * * * and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such * * * railroad * * * from the liability hereby imposed; and any such * * * railroad * * * receiving property for transportation * * * or any * * * railroad * * * delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading * * * for the full actual loss, damage, or injury to such property caused by it or by any such * * * railroad * * * to which such property may be delivered or over whose line or lines such property may pass * * * notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which if is sought to be made is hereby declared to be unlawful and void * * *."

The language in the above section emphatically prohibits

any limitation of a railroad's liability for damages to property in transit. The tariff provisions to be measured against the above prohibition are sections 6 and 7 of the regulations in issue. Section 6 reads (R. 53):

> "*Section 6.*—On eggs placed in packages at rail point of origin of shipment, *no claim shall be allowed* where the physical damage to the eggs at destination does not exceed 3% of the contents of the packages containing damaged eggs. Where damage exceeds 3%, claims shall be allowed for all damage in excess of 3%, if investigation develops carrier liability.
>
> *Exception.*—Where bona fide certificates of Federal or State egg inspection agencies showing extent of physical damage to eggs determined at rail point of origin of the shipment immediately prior to tender for rail transportation indicate the actual shell damage to be other than 2%, the percentage of actual damage as shown on such certificates, plus 1%, shall be used in lieu of 3% specified in this Section." (Emphasis supplied.)

Section 7 is similarly worded except that it applies a 5 percent limitation to claims on eggs placed in packages at points other than the rail point of origin.

For the purpose of phrasing a "limitation of liability" within the meaning of Section 20(11) of the Act, more apt language could scarcely be found than "no claim shall be allowed" as used in the tariff regulations here in issue.

These "no claim shall be allowed" rules are referred to throughout the record as "tolerance" rules, and such designation, though not descriptive, will be used in this argument.

A. The Doctrine of Administrative Finality Does Not Apply in This Case.

As in most appeals from rulings of the Interstate Commerce Commission, the parties who seek to sustain the Commission's action invoked the doctrine of administrative finality in the lower court; and the principal basis of that court's decision seems to be that Congress has entrusted to the Commission determination of the measure of a railroad's liability for damage to a shipment; that questions pertaining to such matters can be decided only by the Commission; and that when the Commission has decided such matters, the courts should keep hands off.

But in this case the Commission strayed outside the fields which Congress committed to its determination, and has undertaken to legislate on a subject as to which it has no power or expertise. Each claim for loss or damage to a shipment is essentially a private matter involving the railroad's liability to an individual shipper for damage to a single shipment. By the time the claim is filed and considered, the transportation agreement has been completely executed and all that remains is a liability to the shipper not different in character from a railroad's obligation to pay for fuel or supplies which it purchases, or its liability for torts committed against non-shippers. When the claim is filed, all of the facts upon which the liability depends are in the past and cannot be changed, and the railroad's liability has been already fixed by established principles of law. A court can decide the amount of the liability by applying the law to the facts in the particular case; but once the transportation is completed by delivery of the shipment, neither the court nor the Commission can alter the amount owed by the railroad to the shipper.

Court decisions lauding Commission expertise and limiting the scope of review have all dealt with matters clearly

entrusted to the Commission by Congress, such as the reasonableness of rates or practices governing transportation, discrimination, public convenience and necessity, control of one common carrier by another, and other matters of a similar character which obviously require legislative determination by skilled experts.

1. Loss and Damage Claims Are Not Within the Jurisdiction of the Interstate Commerce Commission.

In *Bills of Lading*, 52 I. C. C. 671, 685, the Commission said:

> "The liability of common carriers for the loss of, or damage to, shipments rests upon definite legal principles, and the enforcement of such liability is not within the jurisdiction of the Interstate Commerce Commission. *Lost or Damaged Freight Replacement*, 43 I. C. C. 257. It can not direct the payment of a loss-and-damage claim, since the failure to pay would not be a violation of the act to regulate commerce. *Larkin Co. v. Erie & Western Transportation Co.*, 24 I. C. C. 645. The Commission is merely the instrument of the law. Its functions are administrative and quasi-judicial. Its authority to prescribe and impose upon carriers the terms and conditions which they shall write into their bills of lading is limited (1) by the common law; that is, the Commission in no event could impose upon the carriers the assumption of any greater liability than the common law imposes upon them; and, (2) by the statutory law, since the Commission's power and authority springs from and is limited by the organic act."

In *Lost or Damaged Freight Replacement*, 43 I. C. C. 257, 258, the Commission said:

> "The liability of common carriers for the loss of or damage to shipments rests upon definite legal principles, and the enforcement of such liability is not within the jurisdiction of the Interstate Commerce Commis-

sion. This liability should be kept separate from the freight charges. *Larkin Co. v. E. & W. Transportation Co.*, 34 I. C. C. 106-108."

In *S. Landau & Company, Incorporated v. Boston & Maine Railroad*, 208 I. C. C. 669-670, the Commission said:

"Claims for loss and damage to shipments are cognizable only in the courts. *Rosser & Fitch v. A. C. L. R. Co.*, 91 I. C. C. 611; *Atwater & Co. v. M. C. R. Co.*, 107 I. C. C. 491; *Rinelli v. N. Y., N. H. & H. R. Co.*, 112 I. C. C. 567; *Dfaké Produce Co. v. F. E. C. Ry. Co.*, 132 I. C. C. 729; *Luffman & Son v. Seaboard A. L. Ry. Co.*, 147 I. C. C. 600."

2. *The Commission Has No Power to Change the Measure of Damages by Prescribing Rules Which Would Have That Effect.*

In *Rosser & Fitch v. A. C. L. R. R. Co.*, 91 I. C. C. 611, the Commission said:

"Complainants are merchants and shippers at Jacksonville, Fla. * * * We are asked to establish reasonable regulations for the settlement of loss and damage claims. C. W. Zaring & Company intervened in behalf of emplainants.

"Defendants moved to dismiss the complaint on the ground that the subject matter is one over which we have no jurisdiction.

"The sections relied upon by complainants do not empower us to prescribe rules and regulations for the settlement of claims arising from loss or damage to shipments in transit. Such claims, and the measure of damages applicable thereto, are cognizable only in the courts. *Buss Co. v. N. Y. C. R. R. Co.*, 45 I. C. C. 161; *National Industrial Traffic League v. A. & R. R. R. Co.*, 61 I. C. C. 120, 125."

In *Perishable Freight Investigation*, 56 I. C. C. 449, the propriety and lawfulness of the following rule was questioned (p. 481):

> "Carriers furnishing protective services as provided herein do not undertake to overcome the natural characteristics of perishable goods nor the inherent tendency of such goods to deteriorate or decay, nor do the carriers assume any liability for loss or damage resulting therefrom."

The Commission, speaking through Commissioner Eastman, said at page 482:

> "For this reason many of the declarations in the tariff which deal with this matter of liability state with approximate accuracy what we believe to be the law. But such declarations can have no controlling effect, for the carrier's liability for loss or damage is determined by the law. Nothing can be added to or subtracted from the law by limitations or definitions stated in tariffs, and this was admitted by counsel for the Director General. There is the constant risk, therefore, if such declarations are included, of misstating the law and misleading the parties to no good purpose."

The Interstate Commerce Commission has no jurisdiction over a single claim for loss or damage which has occurred in the past. Congress could easily have placed such matters within the discretion of the Commission but saw fit not to do so. It would be strange if the Commission, which admittedly has no jurisdiction over a single claim after the damage has occurred, should be able to deprive numerous shippers of property rights in claims which will occur in the future by the simple device of approving a tariff "rule" or "regulation".

Section 1(6) of the Act (49 U. S. C. 1(6)) makes it the railroads' duty "to establish, observe, and enforce * * * just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and

delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property * * * which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property * * *."

Significantly, the last act mentioned in this section in connection with the transportation is "delivery". Once the property is delivered, nothing is left to regulate except liability of one party to the other; and in Sec. 20(11) Congress has rendered null and void any effort by the railroads to limit their loss and damage liability by tariff regulation.

In *Rosser & Fitch v. A. C. L. R. R. Co.*, 91 I. C. C. 611, the complainants asked the Commission to establish reasonable regulations for the settlement of loss and damage claims, and alleged that the carriers were guilty of practicing unreasonable and unjust regulations in their claim departments in violation of section 1(6) of the Act, but the Commission said:

> "The sections relied upon by the complainants do not empower us to prescribe rules and regulations for the settlement of claims arising from loss and damage to shipments in transit. Such claims, and the measure of damages applicable thereto, are cognizable only in the courts."

B. "Liability", the Limitation of Which Is Proscribed by Section 20(11) Is the Well Defined Liability Imposed on Carriers by the Common Law.

1. *Decisions of this Court so hold.*

In *Adams Exp. Co. v. Croninger*, 226 U. S. 491, this Court considered the liability imposed upon common carriers by

the Carmack Amendment (*infra*, Appendix B, p. 67) and said at pages 506 and 507,

> "The liability thus imposed is limited to 'any loss, injury or damage caused by it or a succeeding carrier to whom the property may be delivered;' and plainly implies a liability for some default in its common-law duty as a 'common carrier.'"

The Carmack Amendment was held constitutional and was analyzed and construed at length in *Atlantic C. L. R. Co.* v. *Riverside Mills*, 219 U. S. 186. The following brief excerpts from that decision speak for themselves:

> "The general doctrine accepted by this court, in the absence of legislation, is, that a carrier, unless there be a special contract, is only bound to carry over its own line, and then deliver to a connecting carrier. That such an initial carrier might contract to carry over the whole route was never doubted. It is equally indisputable that if it does so contract, its common-law carrier liability will extend over the entire route. *Ohio & M. R. Co.* v. *McCarthy*, 96 U. S. 258, 266, 24 L. ed. 693, 696; *Ogdensburg & L. C. R. Co.* v. *Pratt*, *supra*; *Northern P. R. Co.* v. *American Trading Co.*, 195 U. S. 439, 49 L. ed. 269, 25 Sup. Ct. Rep. 84; *Muschamp* v. *Lancaster & P. R. Co.*, 8 Mees. & W. 421." (Page 197.)

* * * * * *

> "The English cases beginning with *Muschamp* v. *Lancaster & P. R. Co.*, *supra*, decided in 1841, down to *Bristol & E. R. Co.*, v. *Collins*, 7 H. L. Cas. 194, have consistently held that the mere receipt of property for transportation to a point beyond the line of the receiving carrier, without any qualifying agreement, justified an inference of an agreement for through transportation, and an assumption of full carrier liability by the primary carrier." (Page 197.)

* * * * * *

> "Upon the other hand, many American courts have repudiated the English rule which holds the carrier to a contract for transportation over the whole route, in

the absence of a contract clearly otherwise, and have adopted the rule that unless the carrier specifically agrees to carry over the whole route, its responsibility as a carrier ends with its own line; and that, for the continuance of the shipment, its liability is only that of a forwarder. The conflict has therefore been one as to the evidence from which a contract for through carriage to a place beyond the line of the receiving carrier might be inferred.

"In this conflicting condition of the decisions as to the circumstances from which an agreement for through transportation of property designated to a point beyond the receiving carrier's line might be inferred, Congress, by the act here involved, has declared, in substance, that the act of receiving property for transportation to a point in another state, and beyond the line of the receiving carrier, shall impose on such receiving carrier the obligation of through transportation, with carrier liability throughout." (Page 198.)

"This burdensome situation of the shipping public in reference to interstate shipments over routes including separate lines of carriers was the matter which Congress undertook to regulate." (Page 200.)

"Reduced to the final results, the Congress has said that a receiving carrier, in spite of any stipulation to the contrary, shall be deemed, when it receives property in one state, to be transported to a point in another, involving the use of a connecting carrier for some part of the way, to have adopted such other carrier as its agent, and to incur carrier liability throughout the entire route, *with the right to reimbursement for a loss not due to his own negligence*. The conditions which justified this extension of carrier liability we have already adverted to. The rule of the common law which treated a common carrier as an insurer grew out of a situation which required that kind of security for the protection of the public." (Page 205.)

In *Galveston, H. & S. A. R. Co.* v. *Wallace*, 223 U. S. 481, 491-2, this court said with respect to the initial railroad's liability for loss of a shipment which moved over connecting lines,

> "Under the Carmack amendment, as already construed in the *Riverside Mills* case, wherever the carrier voluntarily accepts goods for shipment to a point on another line, in another state, it is conclusively treated as having made a through contract. It thereby elected to treat the connecting carriers as its agents, for all purposes of transportation and delivery. This case, then, must be treated as though the point of destination was on its own line, and is to be governed by the same rules of pleading, practice, and presumption as would have applied if the shipment had been between stations in different states, but both on the company's railroad. Thus considered, when the holders of the bills of lading proved the goods had not been delivered to the consignee, the presumption arose that they had been lost by reason of the negligence of the carrier or its agents. The burden of proof that the loss resulted from some cause for which the initial carrier was not responsible in law or by contract was then cast upon the carrier. The plaintiffs were not obliged both to prove their case and to disprove the existence of a defense. The carrier and its agents, having received possession of the goods, were charged with the duty of delivering them, or explaining why that had not been done. This must be so, because carriers not only have better means, but often the only means, of making such proof. If the failure to deliver was due to the act of God, the public enemy, or some cause against which it might lawfully contract, it was for the carrier to bring itself within such exception. In the absence of such proof, the plaintiffs were entitled to recover, and the judgment is affirmed." (Pages 491 and 492.)

In *Lehigh Valley R. Co.* v. *John Lysaght, Limited*, 271 F. 906 (C. A. 2; certiorari denied, 256 U. S. 704), the rail-

road defendant argued that the words, "caused by it", were intended to be restrictive, and that Court said at page 910:

> "Congress cannot have intended to reduce the liability of common carriers to that of ordinary bailees for their own negligence only. Happier words than 'caused by it' might have been used, but they fairly cover loss or damage for which the carrier would be liable at common law."

There can be no doubt that the liability imposed by Section 20(11) is ordinary common carrier liability.

2. The legislative history of Section 20(11) leaves no doubt that the liability therein imposed is the ordinary common law liability of a common carrier.

In *Atlantic C. L. R. Co.* v. *Riverside Mills*, *supra*, the court at pages 200 and 201 quoted from the conference committee report on the Carmack Amendment, and held that the Amendment extended the initial carrier's common law liability to shipments damaged on connecting lines.

Since the words "caused by it" used in the Carmack Amendment were carried forward in the Cummins Amendment, there is no reason to believe that any different kind of liability was intended to be imposed therein than in the Carmack Amendment. However, in view of the weight attached to the words "caused by it" by the lower court, there is attached hereto as Appendix C a brief statement of the legislative history of the Cummins Amendment which leaves no doubt that Congress intended by that amendment to impose common law liability.

C. Under the Common Law Rule, a Carrier Is Liable for Failure to Transport Safely Goods Entrusted to Its Care Unless the Loss or Damage Was Due to Stated Exceptions.

The common law rules governing the liability of a common carrier for damage to goods entrusted to its care are ancient and firmly fixed by judicial decision.

In *Chesapeake & O. R. Co.* v. *Thompson Mfg. Co.*, 270 U. S. 416, 421-2, 70 L. ed. 659, 661, this Court said:

> "* * *, it is agreed by the respondent that every carrier receiving goods for carriage in good condition, and returning them in bad condition, is conclusively presumed to have been negligent and is liable for the damage resulting from its negligence, unless the injury was caused by the act of God, the public enemy, or the act of the shipper or the nature of the goods themselves; that as the evidence and the verdict of the jury established that the damage was not due to any of these causes, the carrier's negligence was to be conclusively presumed, and no notice of claim was necessary under the provisions of the Cummins Amendment.
>
> "It is sometimes said that the basis of the carrier's liability for loss of goods or for their damage in transit is 'presumed negligence.' *Hall* v. *Nashville & C. R. Co.* 13 Wall. 367, 372, 20 L. ed. 594, 596. But the so-called presumption is not a true presumption, since it cannot be rebutted, and the statement itself is only another way of stating the rule of substantive law that a carrier is liable for a failure to transport safely goods entrusted to its care, unless the loss or damage was due to one of the specified causes. See *Memphis & C. R. Co.* v. *Reeves*, 10 Wall. 176, 189, 19 L. ed. 909, 912; *New York C. R. Co.* v. *Lockwood*, 17 Wall. 357, 376, 21 L. ed. 627, 639, 10 Am. Neg. Cas. 624; *Bank of Kentucky* v. *Adams Exp. Co.*, 93 U. S. 174, 181, 23 L. ed. 872, 875."

Other statements by this court are as follows:

"A common carrier assumes all risks except those caused by the act of God and the public enemy." *Memphis Railroad Co.* v. *Reeves*, 77 U. S. 176, 19 L. ed. 909, 913.

"The common law subjects the common carrier to insurance of the goods carried, except as against the act of God or public enemies." *N. Y. C. R. R. Co.* v. *Lockwood*, 84 U. S. 357, 21 L. ed. 627, 639.

"The duty of a common carrier is to transport and deliver safely. He is made, by law, an insurer against all failure to perform this duty, except such failure as may be caused by the public enemy, or by what is denominated the act of God." *President, etc., Bank of Ky.* v. *Adams Ex. Co.*, 93 U. S. 174, 23 L. ed. 872, 875.

"Common carriers of merchandise, in the absence of any legislative regulation prescribing a different rule, are insurers of the goods and are liable at all events and for every loss or damage, unless it happened by the act of God or the public enemy, or the fault of the shipper, or by some other cause or accident expressly excepted in the bill of lading, and without fault or negligence on the part of the carrier. *The Niagara* v. *Cordes*, 21 How., 23 (62 U. S., XVI., 46)." *Washington and G. R. R. Co.* v. *Varnell*, 98 U. S. 479, 25 L. ed. 233.

A summary of the general principles is set forth in *Joseph Toker Co.* v. *Lehigh Valley R. Co.*, 97 A. 2d 598, 599-600 (Supreme Court of New Jersey, 1953):

"With stated exceptions, the common carrier's liability for the loss of property entrusted to it was absolute at common law. See Holmes, The Common Law 180 (1951); Beale, The Carrier's Liability: Its History, 11 Harv. L. Rev. 158 (1897); 9 Am. Jur. 813 (1937); *Chicago & E. I. R. Co.* v. *Collins Produce Co.*, 249 U. S. 186, 192, 39 S. Ct. 189, 63 L. Ed. 552, 555 (1919). The original exceptions were confined to losses resulting from acts of God or the public enemy but they have now been expanded to certain other losses including those resulting from the inherent nature of

the property or the default of the shipper. See *Commodity Credit Corp.* v. *Norton*, 167 F. 2d 161 (C. C. A. 3, 1948); *Ledoux* v. *Railway Express Agency*, 113 Vt. 480, 35 A. 2d 665 (Sup. Ct. 1944); *Villari* v. *James*, 155 Pa. Super. 155, 38 A. 2d 379 (Super. Ct. 1944); 9 Am. Jur. 847 (1937); 13 C. J. S., Carriers, § 79, p. 152 (1939). Cf. *Kassel Poultry Co.* v. *Penna. R. R. Co.*, 145 A. 316, 7 N. J. Misc. 301, 304 (Sup. Ct. 1929). The burden of establishing strictly that the loss resulted from one of the excepted causes has always been recognized as resting on the carrier. 1 Michie, Carriers 820 (1915); *Galveston H. & S. A. R. Co.* v. *Wallace*, 223 U. S. 481, 492, 32 S. Ct. 205, 56 L. Ed. 516, 523 (1912). And this is clearly as it should be, for complete control and knowledge after the shipment has begun are in the carrier rather than the shipper. See *New Brunswick Steamboat & Canal Transp. Company* v. *Tiers et al.*, 24 N. J. L. 697, 700 (E. & A. 1853); *Schnell* v. *The Steamship Vallescura*, 293 U. S. 296, 304, 55 S. Ct. 194, 79 L. Ed. 373, 377 (1934)."

D. Measure of Damages Is the Difference Between the Market Value of the Property at Destination Had It Been Received in Good Condition and Its Market Value in the Condition in Which It Did Arrive There.

In *Gulf, C. & S. F. R. Co.* v. *Texas Packing Co.*, 244 U. S. 31, 37, a case involving a claim for damages to poultry, this Court said in speaking of the measures of damages:

"* * *, the ordinary measure of damages in cases of this sort is the difference between the market value of the property in the condition in which it should have arrived at the place of destination and its market value in the condition in which, by reason of the fault of the carrier, it did arrive. *New York, L. E. & W. R. Co.* v. *Estill*, 147 U. S. 591, 616, 37 L. ed. 292, 304, 13 Supp. Ct. Rep. 444."

In *Chicago, M. & St. P. R. Co.* v. *McCaull-Dinsmore Co.*,

253 U. S. 97, 100, which was an action against a railroad for loss of grain during transportation, this Court said:

> "The rule of the common law is not an arbitrary fiat, but an embodiment of the plain fact that the actual loss caused by breach of a contract is the loss of what the contractee would have had if the contract had been performed, less the proper deductions, which have been made and are not in question here."

In *Illinois Central Railroad Company* v. *Zucchero*, 221 F. 2d 934, 937 (C. A. 8), a case involving damage to bananas in transportation, the Court said:

> "Where property has been damaged in shipment the general rule for determining the amount of damages is the difference between the market value it would have had had it been transported without damage and its market value in its damaged condition."

Where an egg shipment is damaged in the course of transportation, its value in the damaged condition is problematical since it is not ascertainable until the broken eggs have been separated from the unbroken. In order to accomplish this and also to minimize the damage by salvaging as many salable eggs as possible, it is necessary to substitute sound cases, flats, and fillers soaked with the contents of broken eggs. Labor is necessary in this process, of course; and it is clear that the cost of the labor, necessary materials, and warehousing are proper items of damage in addition to the difference in the market value of the eggs in good condition and in their damaged condition.

Not only in the prior regulations pertaining to egg shipments but also in the rules assailed in this case, the railroads recognize that the cost of labor and materials is a proper element of damages (R. 45, 49, 52, and 54).

E. The Tolerance Rules Produce Different Results Than Established Common Law Rules Governing the Lawful Measure of Damages and Constitute a Limitation of Liability Under Section 20(11).

1. The Facts With Respect to Individual Egg Claims Differ Widely. The Tolerance Rules Assume They Are Identical.

The tolerance rules assume that each car subject to the 3 percent rule contained exactly the same percentage of "physical damage to the eggs" at origin (unless there is a Federal or State grading certificate) and a similar assumption is made by the 5 percent rule. With respect to this feature of the rules, Judge Knous said in his dissent (R. 142, 119 F. Supp. 846):

> "* * * The tariff provides that when damage exceeds five per cent, claims shall be allowed for all damage (in excess of five per cent, if investigation develops carrier liability. In all damage claims a shipper may recover only his loss less the tolerances provided for. Thus, one shipper who sends a carload of eggs containing two per cent checked or cracked eggs, collects the same amount as another shipper who sends a carload of eggs, five per cent of which are checked or cracked, if the contents of both cars are destroyed or damaged as a consequence of the carrier's negligence. A shipper might ship two cases of eggs from the lot, one car having a five per cent damage, the other none. The consignee would accept the undamaged car at full price and the shipper would lose five per cent of the value of the second car. To me it appears inescapable that such results limit the liability of the carrier and violate the prohibition of Section 20(11) of the Act."

Section 20(11) of the Act by its terms applies to damage claims individually. It speaks in the singular. It refers to issuance of "a receipt or bill of lading for property re-

ceived" and liability to "the lawful holder thereof for loss, damage, or injury to such property".

It is a simple fact which every court will recognize immediately that facts in connection with different claims vary widely. The general condition of the load, the position of the damaged cases, the kind of damage inflicted (*e.g.*, whether by shift of lading toward one end of the car, vertical oscillation resulting from car vibration, etc.), the manner in which the particular shipment was reconditioned, and the kind of damage covered by the particular claim, all constitute facts upon the basis of which a court upon inquiry can determine with a reasonable degree of certainty, what damage was inflicted in transportation, and the extent of the money damages necessary to make the shipper whole.

Actually, the tolerance rules are mere mathematical formulae designed to reduce the amount of the shipper's recovery for rail damage to his egg shipment, and they certainly achieve that result. Railroads' Exhibit 49 (R. 858-859; R. 1212) shows that the 5 percent tolerance rule reduced by an average of 42.2 percent the claims on all 312 cars subject to that rule which arrived at New York during a 23 month period.

The haphazard results of applying the rules to actual claims would probably confuse a skilled mathematician. For example, on three cars which arrived at New York in August, 1948, the amounts of the claims as filed, the reductions resulting from application of the 5 percent tolerance, and the percentages of reductions were as follows (R. 858-859; R. 1219):

Car	Claim as Filed	Reduction (5% Rule)	Percent of Reduction
NAD 110	$ 6.78	$ 1.27	18.7%
ART 17108	13.32	4.00	30.0%
FGE 52271	290.05	50.24	17.3%
NWX 2128	443.17	260.58	58.8%
URT 86694	714.70	175.24	24.5%

Greater uniformity of results would have been achieved if the rule had been worded, "no claim shall be allowed for more than 57.8 percent of the amount claimed." This would be no more illogical than the assumption in the tolerance rules that at origin all 3 percent cars are in identical condition and all 5 percent cars are in identical condition (in the absence of grading certificates showing otherwise).

As previously mentioned, each damage claim involves events which have happened wholly in the past and is a private controversy between the railroad and the shipper. Settlement of such disputes is purely judicial and not legislative. In connection with the Commission's functions in this respect, see *Baer Bros. Mercantile Co.* v. *Denver and R. G. R. Co.*, 233 U. S. 479, 486.

In *Chicago, M. & St. P. R. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97, 99-100, the carrier sought to defend a tariff rule which provided "the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment." The Interstate Commerce Commission in *Shaffer* v. *Chicago, R. I. & P. R. Co.*, 21 I. C. R. 8, 12, had found the clause valid and not forbidden by law. This Court said:

> "We appreciate the convenience of the stipulation in the bill of lading and the arguments urged in its favor. We understand that it does not necessarily

prevent a recovery of the full actual loss, and that if the price of wheat had gone down, the carrier might have had to pay more under this contract than by the common-law rule. But the question is how the contract operates upon this case. In this case it does prevent a recovery of the full actual loss, if it is enforced."

It is quite clear that the tolerance rules here in issue apply not to the facts pertaining to each individual shipment, but rather assume that the facts are identical to those which the Commission finds apply to the average shipment; and the tolerance rules are thus in plain violation of Section 20(11).

2. *The Only Lawful Measure of Damages Is Based Upon Market Value at Destination. The Tolerance Rules Are Based Upon "The Physical Condition of the Eggs at The Time They Are Offered for Transportation."*

The principle is firmly established that in an action against a common carrier for damages to a shipment in transportation, the measure of damages is the difference between the market value of the shipment at destination in the condition in which it should have arrived and its market value there in its damaged condition. See page 46, *et seq., supra.* In *Chicago, M. & St. P. R. Co.,* v. *McCaull-Dinsmore Co., supra*, this Court struck down a tariff rule which sought to substitute origin value for destination value in measuring the damage to the shipper, although there, as here, the Commission had approved the rule.

The tolerance rules here in issue ignore the established measure of damages and impose a limitation based solely on a condition presumed to exist at origin which bears no relation to destination market value.

The shippers testified that buyers at destination do not turn down egg shipments merely because they contain

checks (R. 954, 958, 988 and 1001). That this is true is obvious from the fact that as the Commission found, the sound commercial shipment contains a few checks. Naturally they still have the same checks at destination; and every shipment or lot of eggs bought or sold at every destination is in the same condition. These are the only eggs which are commercially available and the eggs upon which the market prices are based. They are salable at destination at the market price when they arrive without rail damage. As one shipper witness testified without contradiction, "We may deliver a case or a carload of eggs with a certain number of checks under the standard grading but when the railroad damages the eggs and creates a lot of broken eggs, they have necessarily destroyed the entire grade of the eggs offered at origin" (R. 1001). The only notice which the Commission in its report takes of this testimony is its statement, "Certain tolerances have been adopted by the Department of Agriculture, and the egg trade, in grading eggs." Obviously, the significance of this testimony escaped the Commission completely. This is not surprising because operations of the egg industry are outside the Commission's field of expert knowledge. This points up the dangerous consequences which can result from overextension of the doctrine of administrative finality.

The tolerance rules are not based upon destination market value of the goods shipped, and achieve results inconsistent with the well established measure of damages lawfully applicable.

3. Susceptibility of Eggs to Damage in Transit Is Not an "Inherent Vice."

It is of course apparent that the tolerance rules on their face appear to limit the railroads' liability for damages to

shipments in transportation. The Commission in its report seeks to avoid that result by establishing that a portion of the loss suffered by the shipper or consignee whose egg shipment is damaged by a railroad, is due to "the inherent nature of the commodity transported", and is within one of the recognized exceptions to the railroads' normal common carrier liability.

The Commission does not spell out what it considers the vice or defects to be, *i.e.*, the presence of a few checks in every commercially sound shipment of eggs; the fragility or susceptibility to damage of eggs with sound shells; or the damage susceptibility of the checked eggs alone.

If the Commission had in mind eggs with sound shells, then logically the Commission should have excused the railroads from any liability at all on egg claims.

If the Commission based its decision on the premise that only checked eggs are subject to a natural vice then the Commission has undertaken to draw a line, based on the degree of fragility between non-checked eggs and checked eggs. But if the Commission considers checked eggs subject to a natural vice, how does the vice manifest itself? Obviously it could do so in one of only two ways: (1) the checks could arrive at destination as checks, or (2) they could arrive as broken eggs. This raises two questions: (1) how do they actually arrive, and (2) how does their natural vice or condition contribute to the damage suffered by the shipper.

In what condition do checks arrive at destination? When the shipment arrives in good order, the checks arrive as checks.* The shipment sells at the market price for the

* The "loss" in the 115 car U. S. D. A. tests which typify the eggs loaded into cars at origin increased from 0.1 percent at origin to only 0.3 percent at destination (R. 31; 284 I. C. C. 393-4); and that loss at destination is well below the 0.5 percent allowed in the specifications of the Department of Agriculture for consumer grade AA and A eggs (R. 4; 28 I. C. C. 401).

particular grade specifications for which it was packed and no loss is suffered by the shipper.

If the shipment is damaged in transit, the checks either remain checks, or else, they are broken. If they remain checks, they are not segregated at destination, however. The Commission found that, "The 1.9 percent checks were, however, found by candling and clicking, and could not be detected by the kind of inspection performed at New York" (R. 31; 284 I. C. C. 393-4).

On the other hand, if the checks become broken in transportation, so do many non-checked eggs in the same shipments, because the damaged cases at New York contain on the average over 5 percent loss, which greatly exceeds the 1.9 percent origin checks; and from the damaged cases 3.6 percent cracked eggs are also taken. (See pages 17 and 18, *supra.*) Where sufficient force is applied to break and crack non-checked eggs, it is difficult to see why breakage of the checked eggs by the same force should be attributed to the "inherent nature" of the checks.

Whatever the Commission's theory may have been, susceptibility to damage by application of force is not an inherent vice. Eggs do not break themselves. As stated by Judge Knous in his dissent (R. 142):

> "Checked and cracked eggs, when properly handled, can be shipped interstate without further damage and can be sold to consumers. External force must be applied to such eggs, as well as to perfect eggs, before they are damaged to the extent that they become unmarketable or claims made for damage."

There are many court decisions which relieve carriers of liability because of such natural or inherent causes as fermentation, depreciation, drying, decaying, heating merely as result of transportation, spontaneous combustion, effervescence, putrification, or corrosion or rust resulting from the chemical union of the parts of the goods

shipped. 13 C. J. S., Section 79, page 155. But unlike the fermentation of molasses, *Faucher* v. *Wilson*, 68 N. H. 338, 38 A. 1002; disease of strawberries, *Railway Express Agency, Inc.* v. *S. L. Robinson & Company*, 184 Ark. 660, 43 S. W. 2d 543; or decay of lettuce, *Chesapeake and Ohio R. Co.* v. *Timberlake Carrie & Co.*, 147 Va. 304, 137 S. E. 507; the loss resulting from the breakage of eggs in transit does not result from the operation of natural processes within the egg but is brought about by the application of force from without.

To hold that susceptibility to damage by application of an outside force is an inherent defect sufficient to relieve the carrier from liability would ingraft a new and different exception onto the existing common-law rule governing common carrier liability. Practically all commodities are subject to damage by application of outside force. Even iron castings are not immune to breakage.

If the fragility of the eggs is a natural vice, it is one which did not exist in 1941, which does not exist today in truck transportation, and which does not exist today in rail transportation to destinations throughout the country except New York and possibly a few other eastern points.

Appellants submit that the susceptibility of eggs to damage by the application of outside force is not a natural vice or defect sufficient to relieve carriers of their normal common-law liability and that the tolerance rules constitute patent limitations of liability in violation of Section 20(11) of the Act.

II.

THE COMMISSION'S ORDER AND REPORT ARE BASED ON CONFLICTING FINDINGS AND ARE NOT SUPPORTED BY ADEQUATE FINDINGS OR SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE.

It becomes necessary to consider this point only if the court does not strike down the Commission's approval of the tolerance rules as a violation of Section 20(11) of the Act for the reasons set forth in the preceding argument. However, even if the Commission should hold that the tolerance rules do not violate Section 20(11), it is the position of these appellants that the Commission's order and report are based upon conflicting findings and are not supported by adequate findings or substantial evidence on the record as a whole, and accordingly, that the lower court should have set aside the Commission's action.

With respect to sufficiency of evidence the inquiry is, of course, whether on the record as a whole there is substantial evidence to support the Commission's findings. *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474; *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498.

Also applicable here is the principle stated in *Secretary of Agriculture* v. *United States*, 347 U. S. 645, 654:

> "In short, the Commission has not explained its decision 'with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. *Beaumont, S. L. & W. Ry. Co.* v. *United States*, 282 U. S. 74, 86; *Florida* v. *United States*, 282 U. S. 194, 215. We must know what a decision means before the duty becomes ours to say whether it is right or wrong.' *United*

States v. Chicago, M., St. P. & P. R. Co., 294 U. S. 499, 510-511."

A. Evidence on the Record as a Whole Does Not Support the Approval of Different Tolerances for Eggs Packed at Rail Origins Than for Those Packed at Places Other Than Rail Origins.

The record is completely lacking in statistical support for two different tolerances, one based upon eggs packed at a rail origin and the other upon eggs packed at another point and thence trucked to a rail loading point. The Commission found: "The record indicates that in the transportation of eggs by motor truck the amount of shell damage is negligible" (R. 39; 284 I. C. C. 400). The record contains an abundance of uncontroverted testimony supporting this finding (R. 326, 376, 460-465, 569, 769, 776, 804, and 837). Moreover, the actual experience of two shippers was that their claims for loss were no greater on eggs packed at off-rail points than those packed at rail origins (R. 310, 699, 723, and 1006). Origin inspections of 60 cars by the Western Weighing and Inspection Bureau did not reveal any such difference between 44 of the cars which were packed at rail origins and 3 at off-rail points (Ex. 15, R. 1283-4; R. 301, 302, 303-4).

B. The Commission's Finding That the Record Indicates That "The Inspection of Shipments of Eggs Arriving at New York Is Being Performed with a View to Detecting All Damaged Eggs" Is Uncertain in Meaning and Is Contradicted by Other Findings.

Apparently the Commission, by this finding (R. 34; 284 I. C. C. 394), sought to convey the inference that in the destination inspection at New York, the receivers seg-

regate the small percentage of checked eggs which were present in the shipment at origin and collect damages therefor from the railroads even though such checks were in the shipment at origin.

At the outset, it will be observed that the finding is not definite. Saying that the inspection is "with a view" to detecting all damaged eggs is far different from saying that all damaged eggs are so detected.

Apparently the basis for the Commission's statement is solely the fact that "claims in amounts exceeding 50 percent of the revenue on the entire egg traffic to New York in 1947 do not appear to be based on a cursory inspection." (*id.*) Certainly this is no rational basis for finding that all damaged eggs are segregated at New York.

Directly in conflict with the above finding is the Commission's further finding: "The 1.9 percent checks were, however, found by candling and clicking, and could not be detected by the kind of inspection performed at New York" (R. 31; 284 I. C. C. 393-4), and with the further finding:

> "In the repacking or reconditioning process, eggs are transferred from a damaged case to a good case one whole layer (3 dozen) at a time. In replacing the smashed and leaking eggs, inspection to the next lower layer in the case is continued until a good layer is found. If, however, there is only one leaker in the top layer that egg is replaced and the case is put in the good-order pile. In the inspection the lid must be removed completely from the case, no candling lamp is used and the eggs are not clicked. The inspection is merely visual" (R. 33; 284 I. C. C. 395).

The latter finding itself is further flatly in conflict with another finding: "In the inspection at destination, the consignee's representative examines every egg in the cases disclosing damage" (R. 21; 284 I. C. C. 385), which as pointed out in the footnote at page 13, *supra*, is obviously in error.

C. The Commission's Inference That Checked Eggs Become Broken in Transit Is Couched in Vague Language and Is Contrary to the Evidence.

The Commission stated with respect to checks:

> "The slightest movement in transportation *may* cause additional damage to such eggs. * * * Even a slight enlargement of the check or defective egg *could* by a rupture or break in the shell membrane result in a leaking egg" (R. 42; 284 I. C. C. 402).

Things which "may" or "could" happen are speculative and furnish no basis for a valid finding of fact. The question, if it had any materiality, would be "What does happen?" The record furnishes the answer to the latter question. Cases containing 100 percent checked eggs are shipped by rail from Utah to Los Angeles; and at destination, only about 1 percent are leakers (R. 842, 843). Moreover, in the 115 car U. S. D. A. test described by the Commission, the increase in "loss" in transit was only 0.2 percent, leaving no doubt that the 1.9 percent checks at origin arrive as checks at destination.

The Commission's inference is also directly in conflict with and a reversal of the following finding in *National Poultry, Butter & Egg Asso.* v. *N. Y. C. R. R. Co.*, 52 I. C. C. 47, 54:

> "It should not be concluded, however, that if on an average 19 cracked eggs are packed in a case for shipment, these may reasonably be expected to develop into broken eggs by the necessary and ordinary shocks of transportation. The testimony in this case as to the experiments with cases containing cracked eggs which were subjected to shocks similar to those received in railroad transportation indicates that cracked eggs resist shocks almost as well as sound eggs. Entire cases of cracked eggs are shipped over the railways with little more damage than sound eggs."

This is a unique situation. The Commission finds at one time that cracked eggs resist shock almost as well as sound eggs, and finds or infers at another time that exactly the opposite is true. This raises the question whether the Commission was wrong in the earlier case or in the later one. These appellants submit that the record leaves no doubt that the Commission's finding in the *National Poultry, Butter & Egg Asso.* case was correct, and that its inference in the present proceedings is contrary to the evidence on the record as a whole.

CONCLUSION.

For the foregoing reasons, the judgment of the Court below should be reversed with directions to set aside and enjoin the order of the Interstate Commerce Commission.

Respectfully submitted,

JOHN H. PRATT,
905 American Security Building,
Washington 5, D. C.,
Counsel for Utah Poultry & Farmers Cooperative.

MARCUS WHITING,
4301 S. Racine Avenue,
Chicago 9, Illinois,
Counsel for Armour and Company.

ARTHUR C. O'MEARA,
JOHN P. STALEY,
4115 S. Packers Avenue,
Chicago 9, Illinois,
Counsel for Swift & Company.

August, 1955.

CERTIFICATE OF SERVICE.

I HEREBY CERTIFY that I have this day served the foregoing document upon all parties of record in this proceeding by depositing a copy thereof in the U. S. post office with first class and air mail postage prepaid, properly addressed to counsel of record for each party at his post office address, in accordance with Rule 33 of this Court's Rules of Practice.

JOHN P. STALEY,
Of Counsel.

August 24, 1955.

APPENDIX A.

Section 20(11) of the Interstate Commerce Act, as Amended, Part I (49 U. S. C. § 20(11)).

SEC. 20. (11). That any common carrier, railroad, or transportation company subject to the provisions of this part receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall

be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: *Provided*, That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: *Provided, however*, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared

in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this part to regulate commerce, as amended; and any tariff schedule which may be filed with the Commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the Commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary livestock" shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: *Provided further*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further*, That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State court, only in a State through or into which the defendant carrier operates a line of railroad: *Provided further*, That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or

parts thereof specified in the notice: *And provided further*, That for the purposes of this paragraph and of paragraph (12) the delivering carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination: *And provided further*, That the liability imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this part provided.

APPENDIX B.

The following are the provisions of the Act of June 29, 1906 (Carmack Amendment), the Act of March 4, 1915 (Cummins Amendment), and the Act of August 9, 1916.

1. Section 7 of the Act of June 29, 1906 (Carmack Amendment), provided as follows:

> "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.
>
> "That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof" (34 Stat. 595).

2. The Act of March 4, 1915 (Cummins Amendment), amended the first paragraph of the Carmack Amendment so as to read as follows[1]:

> "That any common carrier, railroad, or transporta-

[1] The provisions added by the Cummins Amendment are italicized.

tion company *subject to the provisions of this Act* receiving property for transportation from a point in one State *or Territory or the District of Columbia* to a point in another State, *Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country* shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass *within the United States or within an adjacent foreign country when transported on a through bill of lading*, and no contract, receipt, rule, regulation, *or other limitation of any character whatsoever*, shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; *and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to*

the manner or form in which it is sought to be made is hereby declared to be unlawful and void: Provided, however, That if the goods are hidden from view by wrapping, boxes, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as are other rate schedules: Provided *further*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further, That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: Provided, however, That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery"* (*38 Stat. 1197*).

3. The Act of August 9, 1916 amended the first proviso of the Cummins Amendment so as to read as follows:

"*Provided, however*, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter

be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to value, be held to be a violation of section ten of this Act to regulate commerce, as amended; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared or agreed upon; and the commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. 'The term 'ordinary live stock' shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses'' (39 Stat. 442).

APPENDIX C.

Legislative History of Cummins Amendment.

The precise language at issue in § 20(11) of the Act—imposing liability on a carrier for the full actual loss, damage, or injury to property "caused by it"—was carefully considered by the Congress. The Senate Committee originally proposed that in the event of loss or damage to property, the carrier was liable for the "actual value of such property" (S. 4522, 63d Cong., 2d Sess.). But Senator Cummins proposed the amendment, during the debate on the bill, to insert in lieu of the words "actual value of such property" the words "actual loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass" (51 Cong. Rec. 9620) because "if the property was damaged, not wholly destroyed, the words of the original bill would seem to have implied that the entire value of the property could be recovered; whereas it is the intent that only the actual loss or damage shall be recovered" (51 Cong. Rec. 9620-9621). Thereupon the amendment was agreed to without further discussion (51 Cong. Rec. 9621).

Subsequently, however, the phrase "caused by it" was the subject of exhaustive consideration by the Senate. Senator Pomerene inquired as to whether the language "caused by it" was broad enough to grant the relief which was desired (51 Cong. Rec. 9622). Senator Cummins replied that under this amendment "the carrier would be liable if the damage came through any failure on its part to exercise that degree of care or that caution which the

law imposes upon the common carrier. It was not the purpose, of course, in this amendment, to either enlarge or diminish the care which the common carrier must bestow upon goods committed to its possession, or, in other words, to change its liability as an insurer" (*ibid.*).

Senator Smith, of Georgia, expressed further concern as to the language "caused by it," stating: "I am just a little afraid that this language might change the standard of liability by the common carrier of freight. The liability is that of an insurre, with certain exceptions. A liability might exist for the common carrier although the damage was not caused by the common carrier at all, the common carrier's liability being that of an insurer, subject, as I recall, to five exceptions, the exceptions being when the injury to the freight is caused by the act of God, public enemies, acts of the public authorities, acts of the shipper, and the inherent nature of the goods" (51 Cong. Rec. 9625). Senator Smith inquired of Senator Cummins whether it would not be better to use the term "transported by it" instead of the term "caused by it" so that the "standard of liability might remain that of an insurer" (*ibid*). Senator Cummins agreed fully with the purpose of Senator Smith and explained that the only reason for his use of the phrase "caused by it" in his amendment was because the original Carmack amendment made carriers liable "to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by the common carrier * * * to which such property may be delivered" (51 Cong. Rec. 9625). Consequently, the Senate voted to reconsider the vote whereby the amendment introducing the phrase "caused by it" was agreed to, and Senator Smith then proposed an amendment to substitute "transported" for "caused" (51 Cong. Rec. 9625).

However, the subsequent debate on the proposal to substitute "transported" for "caused" revealed serious diffi-

culties. There was complete agreement that the "common carrier ought to be made liable as an insurer of the goods precisely as it was liable at common law" (51 Cong. Rec. 9625), but fear was expressed that the amendment substituting "transported" for "caused" would "broaden the liability of the carrier beyond the common-law liability, and to make it liable even though the loss might be occasioned by the public enemy or by the act of God" (*ibid.*) In further debate on the bill, it was decided that the original language "caused by it" should be retained because this language, as interpreted by the courts, made carriers liable as insurers for the loss or damage to property occurring while in the possession of the carriers (51 Cong. Rec. 9780). Several judicial decisions were referred to which emphatically held that the provisions of the Carmack amendment "simply enforced the common-law liability of the common carrier; that is, that the words 'caused by it,' used in the act, do not have the effect of in any way limiting the liability of the carrier" (51 Cong. Rec. 9778). For example, Senator Sutherland referred to the holding in *Louisville & N. R. Co.* v. *Warfield and Lee*, 6 Ga. App. 550, 65 S. E. 308, 310, that "[a]ny injury that a common carrier permits to befall the property while in its custody, otherwise than through the act of God of the public enemy, is in a juridic sense caused by it" (51 Cong. Rec. 9778). He also quoted from the opinion in *Adams Express Company* v. *Croninger*, 226 U. S. 491, 506, that the "suggestion that an absolute liability exists for every loss, damage, or injury, from any and every cause, would be to make such a carrier an absolute insurer and liable for unavoidable loss or damage, though due to uncontrollable forces," and that the phrase "caused by it" plainly implies a liability "for some default in its common-law duty as a common carrier." Senator Sutherland explained that under the *Croninger* decision "the words 'caused by it' have a

useful place in the statute. If they were not there, the plain implication of the decision is that the liability of the carrier would be extended beyond the rule of the common law, and that the effect of those words in the statute is to limit the liability of the carrier to that of the common-law" (51 Cong. Rec. 9778).

Senator Sutherland further explained that the danger which would arise from the adoption of the amendment proposed by Senator Smith—to substitute "transported" for "caused"—"would be that we would leave out of the statute these limiting words, which simply declare the common-law liability of the carrier, and extend the liability of the carrier to the cases which were excepted by the common-law; that is, the carrier under that sort of an amendment would be liable for an injury or loss of goods due to the act of God or the act of the public enemy, the seizure of the goods upon process of a court, inherent defects of the goods, and those things which are recognized by the common-law as constituting exceptions to its liability" (*ibid.*).

Senator Sutherland also referred to the holding in *Missouri, Kansas, and Texas Railway* v. *Harriman*, 227 U. S. 657, 672, that the liability imposed by the Carmack Amendment in 1906 "is the liability imposed by the common law upon a common carrier, and may be limited or qualified by special contract with the shipper, provided the limitation or qualification be just and reasonable, and does not exempt from loss or responsibility due to negligence." He further explained that the effect of the proposed bill, which became the Cummins Amendment, "is to continue the provision of law respecting the common-law liability of the carrier, but to remove the condition which now exists in the statute under which the common carrier is permitted to exempt itself from liability by special agreement" (51 Cong. Rec. 9779).

Senator Smith, who proposed the exemption to substitute "transported" for "caused" stated that the term "caused by it" was "perhaps a little unfortunate: that language might have been used which would have prevented any possible doubt that the act intended to continue the common-law liability of the carrier, which is that of insurer, subject to the five limitations that have been stated, beginning with the act of God and the public enemy, which are two of them" (51 Cong. Rec. 9779), but Mr. Smith recognized "that the language had been construed, and that the courts have declined to narrow the liability on account of this language" and with the "view that the language is not intended to carry any narrowing effect as to the liability of the common carrier, but that the liability is to remain that of the insurer subject to the recognized exceptions—beginning, * * * with the act of God and the public enemy—", Mr. Smith withdrew his amendment (*ibid.*). The original amendment proposed by Senator Cummins, including the phrase "caused by it," was thereupon agreed to (51 Cong. Rec. 9780).

Hence the unequivocal legislative history manifests the Congressional purpose to impose on the carriers the strict common law liability irrespective of proof of negligence.